Supreme Court, U.S.
FILED
JUN 19 1995
CLERK

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No. 94-8842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

LAURENCE M. POWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONER

William J. Johnson, General Counsel
National Association of Police Organizations, Inc.
750 First Street, N.E., Suite 1020
Washington, D.C. 20002
(202) 842-4420
Counsel of Record for *Amicus Curiae*

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Laurence M. Powell's petition for issuance of this Court's writ of certiorari to the United States Court of Appeals for the Ninth Circuit with respect to the use of a law enforcement officer's administratively compelled testimony against him at trial.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the Los Angeles Police Protective League, the certified labor bargaining agent representing the bargaining unit which includes petitioner Powell. NAPO also represents law enforcement officers throughout the rest of the state of California, the territory of the Ninth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 185,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation and prosecution of police.

NAPO has an important interest in this case, as the case presents issues concerning the fundamental and constitutional rights to due process enjoyed by law enforcement officers as

much as by any other individuals, which, unfortunately, have been and are in increasing danger of erosion due to prosecutorial reaction to perceived public "outrage" towards police. Internal police department investigation into the conduct of individual officers is routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Officers' rights are in grave danger of being sacrificed on the altar of political expediency. A clear enunciation of the rights enjoyed by individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of both petitioner Powell and respondent the United States of America to the filing of this brief as required by Rule 37.2 of the Rules of this Court. Copies of both consents are appended hereto as exhibits following the text of this brief.

SUMMARY OF ARGUMENT

The Ninth Circuit's affirmance of petitioner's federal criminal conviction in the face of the government's concession that at least one prosecution witness had been provided with a transcript of petitioner's admittedly compelled testimony prior to testifying[1] and despite the lack of the government's showing that that witness's testimony had not been shaped, altered or affected in any way, directly or indirectly, by knowledge of the contents of petitioner's compelled statement is based upon an unduly restrictive application of the protections of the Fifth Amendment's Self-Incrimination Clause and conflicts with other circuits and at least one state court of last resort. *United States v. Koon*, 34 F.3d 1416 (9th Cir. 1994), *reh'g denied*, 45 F.3d 1303 (9th Cir. 1995). The affirmance, if left uncorrected, will also have a profound chilling effect on the exercise and assertion of the Fifth Amendment's guarantee against compelled self-incrimination by individual officers and will upset the extant framework within which police department internal investigations are conducted throughout this country.

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1 *See*, Unreported Order of the District Court allowing prosecution witness Timothy Briseno's testimony against petitioner although Briseno previously received and read testimony of petitioner which had been compelled by internal affairs investigators, reprinted as Appendix F of the *Petition for Writ of Certiorari* in *Koon v. United States*, Case No. 94-1664 at pages 156a-158a.

ARGUMENT

Individual law enforcement officers execute their official duties under the greatest scrutiny. Their actions, both public and private, are continuously monitored and investigated by their own departments, civilian and professional review boards, state and local regulatory commissions, the print and electronic media, and state, local and federal investigators and prosecutors. This scrutiny has intensified within the last few years as isolated cases involving controversial police actions, including the case at bar, are cited as proof by some that all police cannot be trusted, that all police are brutal, or that all police are racist. Neither this Court nor the people of this nation would stand for such painting with a broad brush of other identifiable groups of individuals. Yet it has become sadly fashionable to negatively stereotype law enforcement officers in a way that would be intolerable if applied to African-Americans, women, Jews, Catholics, homosexuals, persons with disabilities or the elderly. State and federal prosecutors, not immune from the political pressures of the times, are at least tempted to afford individual law enforcement officers accused of wrongdoing a little less due process than another person similarly situated might receive.

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem

a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). *Garrity* and its progeny have yielded a familiar and workable legal framework, well-grounded in the Constitution, for the securing by internal investigators of testimonial evidence from officers who may have knowledge of police misconduct. *See, e.g., United States v. Camacho*, 739 F.Supp. 1504, 1512-15 (S.D.Fla. 1990) (outlining settled constitutional standards of internal police investigations). This effective and constitutional procedure was initially followed in the investigative stages of the case at bar, and proved no obstacle to the *lawful* investigation and prosecution of alleged criminal misconduct. The prosecution grievously erred, however, once it introduced testimony against the petitioner from a witness who had received and read the petitioner's administratively compelled statements regarding the facts of the case.

Under the *Garrity* process, individual officers may be compelled to testify regarding allegations of misconduct, on pain of losing their jobs should they refuse, consistent with the Constitution only when those statements are immunized from use, "directly and indirectly", against the officer in any subsequent criminal proceeding. *Garrity*, 385 U.S. at 500. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). Internal affairs investigators, prosecutors, defense attorneys, union representatives and individual officers are familiar with and understand the practical as well as constitutional dimensions of being called in and compelled to testify about allegations of police misconduct. *See*, Warnken, *The Law Enforcement*

Officers' Privilege Against Compelled Self-Incrimination, 16 U.Balt.L.Rev. 452, 492-515 (1987) (survey of various state statutes codifying constitutional procedures mandated by *Garrity*); *Rights of Police Officers During Internal Investigations: Hearing before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 102nd Cong., 2nd Sess., *passim* (1992) (testimony of witnesses reflecting status of police internal investigative procedure across country). The fact that the individual officer's testimony may not be used against him or her in a subsequent criminal prosecution does not prohibit the police department from appropriately disciplining the officer, including terminating him or her from employment. Nor does the fact that the particular statement and its fruit are prohibited to be used against the officer in a subsequent criminal proceeding prevent the investigation, arrest, charging, prosecution, conviction and punishment of the officer, through independent, non-compelled self-incriminating testimony or any other *lawful* means.

Federal investigators and attorneys in particular have become particularly practiced and adept at isolating Fifth Amendment violation-tainted evidence from trial prosecutors as well as other investigators who are continuing to actively work the case. *See,* Unreported Order of the District Court Granting [Petitioner's] Request for *Kastigar* Hearing, reprinted as Appendix E of the *Petition for Writ of Certiorari* in *Koon v. United States,* Case No. 94-1664 at pages 151a-153a. Most significantly, state and federal prosecutors have proved able in fact to secure convictions against officers guilty of criminal misconduct by *lawfully* and *constitutionally* prosecuting those

officers. Just as police have found that honoring suspects' constitutional rights has not frustrated their ability to secure arrests and convictions, so prosecutors have learned that defendants, including accused police officers, can be successfully prosecuted by *constitutional* means as a *practical* matter.

It being well-settled that the Fifth Amendment's protections may be properly demanded *by* individual police officers as legitimately as those protections may be demanded *of* police officers, officers, departments, investigators, courts and prosecutors have come to rely upon the settled law in this area to guide them in the administration of internal and administrative matters to a degree not found in any other profession. Seen in this context, the Ninth Circuit's circumscription of the extent of the protection of the Fifth Amendment's Self-Incrimination Clause is a matter of profound concern to law enforcement. At the individual level, officers, like all other persons in the Ninth Circuit, now reside under a judicial interpretation of the constitution that expressly refuses to recognize fundamental due process protections to the same extent as recognized by other circuits and state courts of last resort. *See, United States v. North ("North I")*, 910 F.2d 843, *modified, United States v. North ("North II")*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991) (discussing government's high but proper burden of proof in demonstrating that no direct or indirect use of immunized testimony against accused occurred); *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 113 S.Ct. 656 (1992); *United States v. Schmidgall*, 25 F.3d 1523 (11th Cir. 1994); *State v. Vallejos*, 883 P.2d 1269 (N.M. 1994) ("A prohibited use of

immunized testimony 'occurs if a witness's recollection is refreshed by exposure to the defendant's immunized testimony, or if his testimony is in any way "shaped, altered or affected," by such exposure.'") (quoting *Poindexter*, 951 F.2d at 373 (quoting *North I*, 910 F.2d at 863)), *But see, United States v. Bartel*, 19 F.3d 1105 (6th Cir.), *cert. denied*, 115 S. Ct. 113 (1994) (declining to require government to prove witness's testimony not in any way influenced by exposure to immunized testimony).

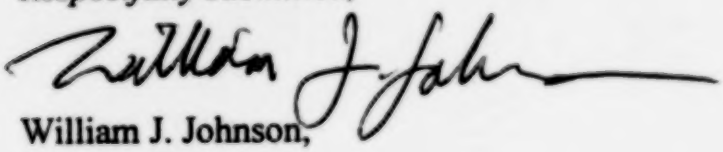
At the organizational level well-established, workable and effective means of addressing allegations of misconduct while honoring individual officers' fundamental rights are in substantial danger of being thrown into chaos because of the uncertainty injected into the system by the Ninth Circuit's ruling. At the professional level attorneys, police administrators, union representatives and shop stewards stand unsure of the status of the law and uncertain how best to advise officers and other clients regarding this most fundamental right. While some uncertainty may be inherent in advising clients of their rights under the law, this Court ought to grant the opportunity to clarify those rights when possible, as here.

This opportunity is all the more imperative when such a clarification would serve to vindicate the rights of persons who, despite being viewed as presently unpopular, or, rather, because of that fact, are especially in need of our constitution's protections.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations respectfully requests that the Court grant petitioner Powell's application and issue its writ to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



William J. Johnson,
General Counsel
National Association of Police Organizations, Inc.
Suite 1020
750 First Street, N.E.
Washington, D.C. 20002
(202) 842-4420

Counsel of Record for *Amicus Curiae*